Abdul Majid bin Hj Nazardin & Ors v Paari Perumal

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–04–22 OF 2001
GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ALAUDDIN JJCA
7 MARCH 2002

Labour Law *— Employment — Probationer — Whether confirmed employee — Employee not confirmed but was allowed leave after probationary period — Employers did not pay employee any increment — Whether employee confirmed — Whether employee entitled to increment — Damages to be awarded*

The respondent worked as a clerk in the appellants' firm of solicitors and was to be a probationer for three months. At the end of the probationary period, the respondent continued working and the appellants continued to pay him his salary. Additionally, they granted him annual leave on six occasions after the expiry of the probation period. As may be seen from the terms of his letter of appointment, the respondent would only be entitled to such leave if he were a confirmed employee. The appellants did not pay the respondent the increment which he would be entitled to receive had he been a confirmed employee. Since he did not get it, he left the employment. The respondent then proceeded to commence an action for breach of contract. The learned magistrate who heard the case dismissed the action. The respondent appealed to the High Court, which reversed the magistrate's decision (see [2000] 6 MLJ 602). The appellant appealed to this court to reverse the High Court's judgment and to restore the learned magistrate's decision.

Held, partially allowing the appeal:

(1) An appellate court did not exceed its function if, in an appropriate case, it reversed the conclusions of fact which were inconsistent with the fair inferences that were to be drawn from proved or admitted facts. The court was satisfied that the learned judge did not exceed the bound of this principle. The appeal against liability accordingly failed (see p 643F–G).

(2) By acting towards the respondent as if he were a confirmed employee, eg by giving him the leave, the appellants were taking a position or must be deemed to have taken the position that the appellant was confirmed. Once this finding had been made, correctly by the learned judge, that the respondent was a confirmed employee, it followed that he would be entitled to the increment claimed (see pp 643H, 644A); *KC Mathews v Kumpulan Guthrie Sdn Bhd* [1981] 2 MLJ 320 and *V Subramaniam & Ors v Craigielea Estate* [1982] 1 MLJ 317 distinguished.

(3) The respondent had been in the appellants' employment for only nine months. To award him 13 months salary less the mitigated

A sum smacked of punitive damages was far too severe a punishment upon the appellants. Having regard to the totality of the circumstances, the learned judge's award was accordingly substituted (see p 644C–D).

B [**Bahasa Malaysia summary**

Responden bekerja sebagai seorang kerani dalam firma guaman perayu-perayu dan sepatutnya di bawah tempoh percubaan selama tiga bulan. Pada akhir tempoh percubaan tersebut, responden terus bekerja dan perayu-perayu terus membayar gaji beliau. Tambahan
C lagi, mereka telah memberikan beliau cuti tahunan untuk enam kali selepas tamat tempoh percubaan tersebut. Sebagaimana yang dilihat daripada terma-terma surat lantikan beliau, responden hanya berhak untuk mendapat cuti tahunan jika beliau seorang pekerja yang telah disahkan lantikannya. Perayu-perayu tidak membayar responden kenaikan gaji yang beliau sepatutnya berhak menerima jika beliau
D seorang pekerja yang telah disahkan lantikannya. Memandangkan beliau tidak mendapatnya, beliau telah meninggalkan pekerjaan tersebut. Responden kemudian telah memulakan satu tindakan kerana pelanggaran kontrak. Majistret yang arif yang mendengar kes tersebut telah menolak tindakan tersebut. Responden telah membuat
E rayuan ke Mahkamah Tinggi, yang telah mengakaskan keputusan majistret (lihat [2000] 6 MLJ 602). Perayu memohon mahkamah ini untuk mengakaskan penghakiman Mahkamah Tinggi tersebut dan mengekalkan keputusan majistret yang arif.

Diputuskan, membenarkan sebahagian rayuan tersebut:

F (1) Satu mahkamah rayuan tidak melampaui fungsinya jika, dalam kes yang sesuai, ia mengakas kesimpulan fakta yang tidak konsisten dengan inferen yang adil yang telah ditemui daripada fakta-fakta yang telah dibuktikan atau dikemukakan. Mahkamah berpuas hati bahwa hakim yang arif tidak melampaui had prinsip ini. Rayuan
G terhadap liabiliti sewajarnya patut gagal (lihat ms 643F–G).

(2) Dengan bertindak terhadap responden seperti beliau seorang pekerja tetap, iaitu dengan memberikan beliau cuti, perayu-perayu telah mengambil satu kedudukan atau mesti telah menganggap telah mengambil kedudukan bahawa responden
H telah disahkan lantikannya. Setelah penemuan ini telah dibuat dengan betul oleh hakim yang arif, bahawa repsonden adalah seorang pekerja yang telah disahkan lantikannya, maka beliau berhak mendapat kenaikan gaji seperti yang dituntut (lihat ms 643H, 644A); *KC Mathews v Kumpulan Guthrie Sdn Bhd* [1981] 2 MLJ 320 dan *V Subramaniam & Ors v Craigielea Estate*
I [1982] 1 MLJ 317 dibeza.

(3) Responden telah bekerja dengan perayu-perayu hanya untuk sembilan bulan. Untuk mengawardkan beliau gaji 13 bulan

ditolak jumlah yang dimitigasikan, sebagai ganti rugi punitif, adalah terlalu berat hukuman ke atas perayu-perayu. Dengan mengambilkira keseluruhan keadaan, award hakim yang arif sewajarnya digantikan (lihat ms 644C–D).]

Notes

For cases on probationer, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 923–930.

Cases referred to

KC Mathews v Kumpulan Guthrie Sdn Bhd [1981] 2 MLJ 320 (distd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395 (refd)
V Subramaniam & Ors v Craigielea Estate [1982] 1 MLJ 317 (distd)

Appeal from: Civil Appeal No R2–11–71 of 1999 (High Court, Kuala Lumpur)

Thavalingam Thavarajah (*Haslina Hassan* with him) (*Zaid Ibrahim & Co*) for the appellants.
Paari Perumal representing himself as the respondent.

Gopal Sri Ram JCA (delivering judgment of the court): Contrary to the submissions of counsel for the appellants, this appeal raises no point of law of any importance. It is a decision peculiar to its own facts. Those facts may be shortly narrated.

The respondent (whom we shall refer to as the plaintiff) worked as a clerk in the appellants' firm of solicitors. He commenced employment on 2 February 1994. This is what his letter of appointment says in its material portions:

(a)	Salary:	RM1,100 per month;
(b)	Office hours:	Monday to Friday — 9am to 5.30pm Saturday — 9am to 1pm;
(c)	Annual leave:	14 days to be applied within seven days in advance and to be taken at times convenient to our firm. (Applicable upon confirmation);
(d)	Probation period:	Three months.

So, the plaintiff was to be a probationer for three months. After the expiry of that period, he could either be confirmed or shown the door. Neither happened here.

At the end of the probationary period, the plaintiff continued working and the defendants continued to pay him his salary. Additionally, they granted him annual leave on six occasions after the expiry of the probation period. As may be seen from the terms of his letter of appointment, the plaintiff would only be entitled to such leave if he were a confirmed employee.

The defendants did not pay the plaintiff the increment which he would be entitled to receive had he been a confirmed employee. The plaintiff

A continued to work for a period of about nine months after his period of probation expired. He gave evidence at the trial that he had made several demands for the increment he felt he was justly entitled to have. Since he did not get it, he left the employment. He resigned his position. He did so on 30 January 1995. His last drawn salary as at that date was RM1,100. The plaintiff then proceeded to look for alternative employment. He eventually B found a job on 1 June 1996. In the meantime, he had commenced an action for breach of contract in the Magistrate's Court at Kuala Lumpur.

The learned magistrate who heard the case dismissed the action. The plaintiff appealed to the High Court, which intervened, reversed the magistrate's decision and entered judgment for the plaintiff and awarded C him 13 months salary less the mitigated gain of RM500 obtained from his new employment. A further sum of RM900 was also awarded for the loss of nine months increment. The defendants now ask this court to reverse the High Court's judgment and to restore the learned magistrate's decision.

We have perused the record most carefully and we find, as did the D learned judge, that the learned magistrate had fallen into serious error in arriving at her decision. It is unnecessary for us to enumerate the instances in which she failed to draw the proper inferences from the unchallenged evidence and admitted facts adduced before her. All the learned judge did, as he was obliged to do, was to draw the inferences which ought to have been properly drawn from the proved and admitted facts. He surely cannot E be faulted for doing that. Accordingly, we find no merit in the arguments advanced by Mr Thavalingam that there had been unwarranted intervention in the instant case.

This court has on several occasions summarized the instances in which appellate intervention may be warranted. One of these instances is F conveniently encapsulated in the joint judgment delivered by this court in *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395.

At the risk of repetition, we emphasize that an appellate court does not exceed its function if, in an appropriate case, it reverses conclusions of fact which are inconsistent with the fair inferences that are to be drawn from proved or admitted facts. We are satisfied that the learned judge did not G exceed the bound of this principle. The appeal against liability accordingly fails.

We now turn to the question of quantum. The first head of damages we address is the award of RM900 made by the learned judge. Now, the point here is simple enough. Either the plaintiff was a probationer when he left or H he was not. By acting towards the plaintiff as if he were a confirmed employee, eg by giving him the leave to which we referred to earlier, the defendants were taking a position or must be deemed to have taken the position that the plaintiff was confirmed. That is an inference a reasonable tribunal will draw from the facts. It follows that the authorities strenuously advanced before us, namely *KC Mathews v Kumpulan Guthrie Sdn Bhd* I [1981] 2 MLJ 320 and *V Subramaniam & Ors v Craigielea Estate* [1982] 1 MLJ 317 do not apply to the facts and circumstances of the present instance. In those cases, there was not the kind of conduct that is to be

found here. They are therefore readily distinguishable. It follows from what we have said thus far, that once the finding has been made, correctly by the learned judge, that the plaintiff was a confirmed employee, it follows as night follows day, that he would be entitled to the increment claimed. We therefore find no merit in the complaint that the RM900 should not have been awarded and we affirm the learned judge's decision on this point.

We now turn to consider the complaint in respect of the award made for the period of non-employment. The contract between the plaintiff and the defendant as evidenced in the employment letter provides for no period of notice. In such a case, as this, then the proper principle to be applied is plainly obvious. It is that the plaintiff is entitled to reasonable notice. What is reasonable depends on the facts and circumstances of each case. The fact that the plaintiff did or did not attempt to mitigate is relevant but not conclusive.

On the facts before us, the plaintiff had been in the defendant' employment for only nine months. To award him 13 months salary less the mitigated sum smacks of punitive damages. It is far too severe a punishment upon the defendants. Having regard to the totality of the circumstances, we consider that a reasonable period of notice in this case would have been three months. If that period of notice had been given at the appropriate time after 30 April 1994, we do not think that the plaintiff would have had any ground for complaint. Accordingly, we would set aside the learned judge's award of RM12,200 and substitute it with an award of RM3,600.

Now for the question of costs, Mr Thavalingam frankly concedes, as he is driven to, that his memorandum of appeal makes no specific complaint about the issue of damages. What he was actually seeking to do was to obtain a complete reversal of the High Court's judgment and a restoration of the magistrate's order. Taking into account the fact that he has failed in this attempt, it would not be fair to order costs against the plaintiff in this court. We would therefore order costs against the defendants and in favour of the plaintiff in this court.

The appeal is allowed to the limited extent already indicated. The deposit is to be paid to the respondent to account of taxed costs. For completeness, costs at all level are awarded to the respondent. The orders of the judge in all other respects are confirmed.

Appeal allowed to a limited extent.

Reported by Peter Ling